

GANESAN DORAISAMY & ANOR.

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v.

BASKARAN MADHAVAN NAIR

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR CJ (MALAYA)

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LEE HUN HOE CJ (BORNEO)

HASHIM YEOP SANI SCJ

[CIVIL APPEAL NO. 286 OF 1984]

27 DECEMBER 1985

CIVIL PROCEDURE: *Sale and Purchase agreement - Application for rescission under O. 81 r. 1 of Rules of the High Court 1980 - Whether there was an oral promise that the Ruler-in-Council's consent should be obtained first - Whether evidence of oral undertaking is relevant and admissible - Proviso (c) to s. 92 of Evidence Act.*

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The appellants (purchasers) and the respondent (vendor) had entered into a sale and purchase agreement wherein it was stated that in the event of the balance purchase price of RM50,000 not being paid within 5 months from the date of execution of the agreement, the deposit of RM20,000 would be forfeited and the appellants would have to give vacant possession of the land.

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The respondent applied under O. 81 r. 1 of the Rules of the High Court 1980 for the rescission of the agreement between him and the appellants and the forfeiture of the sum of RM20,000 as the appellants had not paid within the stipulated time. The learned Judge dismissed the application in Chambers but reversed the decision in open Court after hearing further arguments under O. 56 r. 2.

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The appellants are now appealing against the decision and argue that there was a separate oral agreement which constituted a condition precedent in that it imposed an obligation upon the respondent under the agreement, namely to obtain the approval of the Ruler-in-Council for transfer and further argue that evidence of a separate oral agreement is clearly admissible under proviso (c) to s. 92 of the Evidence Act.

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Held:

[1] In respect of the land, the subject matter of the agreement, there was in fact a restriction in interest endorsed against a transfer without the consent of the Ruler-in-Council.

[2] There arose questions which had to be determined namely, whether the respondent did orally promise that he would obtain the consent of the Ruler-in-Council necessary for the transfer and if the respondent did give the oral promise, the further question that called for determination was whether it was a term or a condition precedent. In law, therefore, there is an issue to be tried.

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[3] Proviso (c) to s. 92 of the Evidence Act clearly provides that the existence of an oral undertaking may be proved and the appellants were permitted in law to adduce evidence to prove the existence of such a promise. And in the event of a finding that there was such an oral undertaking, the appellants, having entered into the agreement on the strength of such a promise, were entitled to rely on that promise.

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[4] There were issues which must be resolved at the trial. These issues are either of law or fact or both and certainly are not matters which can be decided on affidavit evidence.

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[Appeal allowed with costs.]

a Cases referred to :*Yong Ung Lai v. Enting* [1965] 2 MLJ 98*City and Westminster Properties [1934] Ltd. v. Mudd* [1959] 1 Ch 129**Legislation referred to:**

Evidence Act 1950, ss. 91, 92

Rules of the High Court 1980, O. 81 r. 1, O. 56 r. 2

b*For the appellants - Chandran Nair; M/s. Thevin Chandran Siva & Chong**For the respondent - P.S. Gill; M/s. Gill & Tang***JUDGMENT****Abdul Hamid Omar CJ (Malaya):****c**

The respondent/plaintiff Baskran s/o Doraisamy applied under O. 81 r. 1 Rules of the High Court, 1980 by way of summons-in-chambers for the rescission of an agreement between him and the appellants/defendants Ganesan and Ramalingam and for the forfeiture of a sum of RM20,000, a deposit paid by the appellants under an agreement dated 11 February 1983. The application by the respondent was founded on the ground that the appellants had no defence to his action.

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The learned Judge heard the application in Chambers and dismissed it. However after hearing further arguments under O. 56 r. 2 of the Rules of the High Court in open Court he reversed the decision and allowed the application with costs. He ordered the rescission of the agreement, the delivery up of vacant possession of the property and damages for wrongful occupation of the property. The memorandum of transfer deposited with the solicitors concerned was to be returned to the respondent as it was declared null and void.

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The learned Judge correctly took the view that the respondent's case revolved round certain clauses of the agreement, in particular Clauses 2, 3, 5, 6, and 12. For convenience they are reproduced hereunder:

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2. The balance of the purchase price amounting to Ringgit Fifty thousand (RM50,000) only shall be paid by the Purchasers to Messrs. Y.K. Saw & Co., of No. 31-A, First Floor Jalan Tengku Kelana, Kelang, Selangor within five (5) months from the date of execution of this Agreement. The said solicitors are hereby authorised to utilise part thereof to pay off the balance of the loan to D & C Bank, Kuala Lumpur to secure the discharge and custody of the Title Deed and the balance after deduction thereof shall only be paid to the Vendor upon presentation of the Transfer to the Land Office, K.L. for registration.

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3. The Purchaser shall be entitled to borrow a loan from Bank/financial institution to finance the purchase of the said property Provided Always that the date of completion as set out in Clause 2 hereof shall always be strictly adhered to by the purchasers.

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5. In the event that the Purchasers fail to pay the balance of the purchase price pursuant to Clause 2 hereof, the deposit of Ringgit Twenty thousand (RM20,000) only shall be forfeited by the Vendor as liquidated damages and this Agreement shall become null and void and both parties shall make no further claim against each other.

5(b) In the event that the Purchasers fail to pay the balance of the purchase price pursuant to Clause 2 hereof, the purchaser 'undertakes' to give vacant possession with immediate effect.

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6. In the event that the Vendor shall fail to complete this transaction for any reason whatsoever the Purchaser shall, unless there are express provisions hereinafter contained to the contrary, be entitled to the remedy at law for specific performance and all costs and expenses incurred

in by the Purchaser in connection therewith shall be borne and paid by the Vendor including he Purchaser's solicitor's costs on a solicitor's and client's basis Provided Always that nothing herein contained shall in any way effect or prejudice any other rights or remedies which the Purchaser may have in law.

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6(b). The Vendor hereby undertake to refund all sums received herein to the Purchasers in the event that the State Authority refuse to approve the Transfer or the transfer cannot be registered in the relevant Land Office for whatever reasons.

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12. Time wherever mentioned in this agreement shall be deemed to be essence of the contract.

Having considered them, the learned Judge formed the view that as the appellants had failed to pay the balance of the purchase within the time limit provided the respondent's solicitors therefore properly issued a notice (26 July 1983) to the appellants invoking Clause 2 of the agreement which require the appellants to pay the balance of the purchase price within 5 months from the date of the execution of the agreement. He also formed the view that as time was the essence of the contract the respondent had properly invoked Clause 5 of the agreement to forfeit a sum of RM20,000 and to terminate the agreement.

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In the same notice the respondent also asked the appellants to deliver up vacant possession. The appellants refused to deliver up vacant possession contending that at the time the agreement was executed the respondent has orally agreed to obtain the consent of the Ruler-in-Council to transfer the title to them to enable them to obtain the housing loan from a financial institution. Alternatively the appellants contended that as the title was endorsed with the restriction in interest to the effect that:

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the land hereby alienated shall not be transferred without the consent of the Ruler-in-Council.

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there was an implied condition that the agreement could only be concluded upon obtaining the consent of the Ruler-in-Council and the respondent's failure to do so despite repeated requests entitled them to treat the agreement as having been rescinded, in which event the respondent was to refund the deposit to them and they would in turn deliver up vacant possession to the respondent.

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In the Court below Counsel for the appellants submitted that although ordinarily in a contract of this nature where the mode and times of payment have been stipulated, the stipulation has to be complied with, but argued that in the instant case the terms of the agreement were such that evidence of oral undertaking by the respondent at the time of the execution of the agreement, namely that the respondent was to obtain necessary consent of the Ruler-in-Council before the stipulation contained in Clause 2 could take effect, was relevant and admissible under ss. 91-92 Evidence Act. It is the appellants' contention this oral undertaking did not contradict, vary, add to or subtract from the terms of the written agreement.

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The learned Judge found no merit in the argument. He formed the view that obviously such evidence would *per se* contradict and vary the unambiguous terms of Clauses 2, 5 and 6. He rejected the appellant's contention that the restriction in interest appearing in the document of title constituted an implied term and that the agreement could not be concluded unless the consent of the Ruler-in-Council was obtained. He also rejected the argument that the respondent's failure to comply with such term prevented the purchase of the property from going through and it also went to the root of the matter on the authority of *Yong Ung Lai v. Enting* [1965] 2 MLJ 98.

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- a* The learned Judge distinguished *Yong's* case with the present case forming the view that - (a) sub-clause (b) of Clause 6 envisaged of the possibility of the transfer being refused by the Ruler-in-Council in which event provision was made for the refund of all sums received by the respondent; and (b) it was obvious from Clause 2 that payment of the balance of the sum of RM50,000 within five months from the date of the execution of the agreement was to enable the respondent's solicitors to utilise part of the sum to secure the release of the title deed from the respondent's bank for purposes of effecting a transfer. And the balance of the purchase price was to be held by the respondent's solicitors pending a transfer by registration. And it was only after the registration that the respondent was to be entitled to the payment of the balance sum remaining with his solicitors.

- c* The learned Judge concluded that since Clause 2 provided that time, wherever declared, was to be the essence of the contract, and Clause 3 provided that time frame was to be strictly adhered to, the appellants had therefore failed to raise a triable issue. A number of grounds were set out in the memorandum of appeal. Suffice if we direct our attention to grounds 2, 3 and 4 as follows:

- d* 2. The learned Judge erred in law and in fact when he failed to direct his mind to the fact that any agreement in respect of a piece of land on which there was an express restriction against transfer without the consent of the Ruler-in-Council must necessarily be a conditional agreement the fulfilment of which condition would be a prerequisite to its consequent completion.

3. The learned Judge failed to give adequate consideration to the fact notwithstanding the omission in the agreement of an express provision to the effect that it was conditional to the obtaining of the necessary consent it was nevertheless an implied condition which had to be first complied with before the intention of the parties could be fruitfully achieved.

- e* 4. The learned Judge was wrong in law when he concluded that evidence relating to the obtaining of the approval and consent of the Ruler-in-Council by the plaintiff would be inadmissible under s. 91 and 92 of the Evidence Act as this evidence would in effect be evidence of the factual background known to the parties being primarily the genesis of the transaction envisaged which the Courts have consistently accepted as evidence that may be introduced without contradicting s. 91 & 92.

- f* We would first of all refer to the pleadings. The appellants specifically pleaded in their defence that collateral to the sale/purchase agreement, the respondent orally promised that he would obtain the necessary consent from the Ruler-in-Council for the transfer of the title to enable them to apply for a housing loan from a financial institution.

- g* They also pleaded that the sale/purchase agreement was subject to the implied condition. In view of the restriction attaching the transfer of title, the sale/purchase transaction was to be concluded only upon the obtaining of a letter of consent from the Ruler-in-Council. The appellants also affirmed to that effect in the affidavit in reply to the respondent's affidavit-in-support of the application for rescission of the agreement and the forfeiture of the deposit.

- h* The pleadings, in our view, clearly raise a question of the consent of the State Authority for a transfer. The question emerges for reason that there is in force upon the title a restriction against a transfer without such a consent. That being the case, evidence which relates to the existence or otherwise of a promise or an oral undertaking concerning the written agreement and which may constitute a condition precedent to the attaching of an obligation under such agreement becomes relevant. Now whether or not the respondent did give such oral undertaking is a question of fact and a decision shall have to be made. A finding shall also have to be made whether such an undertaking constituted a condition precedent making
- i* it obligatory on the part of the respondent to secure the necessary consent to their further performances by the appellants of their obligation under the agreement.

In the present case it is not in dispute that the document of title contains an indorsement showing a restriction in interest, a restriction against any transfer without prior consent of the State Authority. It is also not in dispute that prior approval of the Ruler-in-Council had to be secured. At any rate the respondent himself did not dispute these facts. The only affidavit disputing the appellants' allegations that the respondent had given an oral undertaking came from Paramjit Singh Gill the respondent's solicitors. He affirmed to the effect that the respondent never agreed at any time that he would arrange or be responsible for the consent of the Ruler-in-Council for the transfer of the title, and as the respondent was residing in Kedah he was in no position whatsoever to attend to any application for such consent.

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In this regard the Court below had probably not attached any weight to the respondent's solicitors' averment since they were matters which apparently were within the personal knowledge of the respondent. There was no reason given anywhere for the respondent's failure to affirm an affidavit disputing the appellants' allegations and to state firmly that he did not give such an oral undertaking or had never agreed to arrange or be responsible for the consent.

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We reiterate that in respect of the land the subject-matter of the agreement there was in fact a restriction in interest endorsed against a transfer without the consent of the Ruler-in-Council (Q.T. Register Dist. of Kuala Lumpur No.Q.T.(R) 8199 State of Selangor) to the effect that

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the land hereby alienated shall not be transferred without the consent of the Ruler-in-Council.

In view of the foregoing, the central question that arises for determination is whether the respondent did orally promise that he would obtain the consent of the Ruler-in-Council necessary for the transfer. Clause 6(b) of the agreement seems to support the appellants' allegation, at any rate appears consistent with their contention that there was the question of the respondent's oral promise which called for determination. And if the respondent did give the oral promise, the further question that called for determination was whether it was term or condition precedent. In law, therefore, there is an issue to be tried.

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The further question that calls for our consideration is whether evidence of oral undertaking is relevant and admissible. The learned Judge referred to Clause 6(b) of the agreement and formed the view that evidence relating to oral agreement would *per se* contradict and vary the unambiguous term of Clauses 2, 5 and 6. With respect we disagree. Such a finding cannot in the light of proviso (c) to s. 92 of the Evidence Act be upheld. The proviso reads-

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(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved.

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Basically, it is the appellant's contention that there was a separate oral agreement which constituted a condition precedent in that it imposed an obligation upon the respondent under the agreement, namely, to obtain the approval of the Ruler-in-Council for a transfer. It is the appellants' further contention that evidence of separate oral agreement is clearly admissible under proviso (c) of s. 92 of the Evidence Act. We are constrained to say there is merit in the argument. Proviso (c) of s. 92 of the Evidence Act clearly provides that the existence of an oral undertaking may be proved. It may well be that the onus is on the appellants to prove the existence of such an oral undertaking, but that is hardly the point. What matters is that clearly the appellants were permitted in law to adduce evidence to prove the existence of such a promise. And in the event of a finding that there was such an oral undertaking

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a that emanated from the respondent, the appellants, having entered into the agreement on the strength of such a promise, were entitled to rely on that promise. (see *City and Westminster Properties* [1934] *Ltd. v. Mudd* [1959] 1 Ch. 129).

It is our judgment therefore that there were issues which must be resolved at the trial. These issues are either of law or fact or both and certainly are not matters which can be decided on affidavit evidence.

b In consideration, we see no justification for the learned Judge to hold that no triable issue had been raised. Accordingly, this appeal is allowed with costs.

The order made by the learned Judge in terms of the application should be set aside and substituted therefor an order dismissing the application.

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Also found at [1986] 1 CLJ 401

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